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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 261

REVERE LAND COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 36a-42a)[1] is reported at 7 T. C. 1061. The opinion of the Court of Appeals for the Third Circuit (R. 97-123) is not yet reported.

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[1] "R" references are to those pages of the "Transcript of Record" which were printed as the Appendix to the Commissioner's brief in the court below, together with the proceedings before the Court of Appeals. The entire transcript of record is before the Court although not printed.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 18, 1948 (R. 80) and a petition for rehearing was denied on July 29, 1948 (R. 96). The petition for a writ of certiorari was filed on September 3, 1948. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals err in holding that taxpayer's payment of $1,026,227.50 toward the cost of the office building erected by the lessee on taxpayer's land was not an investment by taxpayer in the building entitling taxpayer to depreciation under Section 23(l) of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(l) [As amended by Section 121(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolesence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(26 U.S.C. 23.)

STATEMENT

The facts found by the Tax Court may be summarized as follows:

The taxpayer is a Pennsylvania corporation with its principal place of business in Pittsburgh, Pennsylvania. Strasswill Corporation, hereinafter referred to as "Strasswill" and Grant Building, Incorporated, hereinafter referred to as "Grant," are also Pennsylvania corporations with principal offices in Pittsburgh, Pennsylvania. (R. 36a-37a.)

On July 30, 1927, taxpayer entered into a written agreement with Strasswill evidencing the fact that it was engaged in the acquisition of three adjoining parcels of land in Pittsburgh and providing that Strasswill was to have an option to lease this property if acquired by taxpayer upon the condition that lessee erect on the premises an office and garage building to cost not less than three million dollars. The agreement further provided that taxpayer was to furnish $1,030,877.95 of the sum required to construct the building. (R. 37a.) On this same date, July 30, 1927, Strasswill assigned to Grant all of its rights under the contract and two days later, on August 1, 1927, Grant served formal notice upon the taxpayer of its exercise of the option. (R. 37a.)

On August 5, 1927, Grant entered into a contract with Thompson-Starrett Company for the erection of an office building and garage, at a cost limit of $4,350,000, upon the property to be leased from taxpayer. On August 16, 1927, a lease agreement

was entered into between taxpayer and Grant pursuant to which Grant was leased the three parcels of land referred to above for a period of 99 years with the privilege of successive renewals for terms of 99 years. The rental to be paid was $138,000 per year. Grant, the lessee, obligated itself to erect a building at a cost of not less than three million dollars in accordance with plans and specifications approved by the taxpayer, and, during the terms of the lease, to pay taxes and insurance and, in case of destruction of or damage to the building, to replace it as nearly as practicable. The lease further provided that the lessee was to keep the building in good order and repair and from time to time to make renewals and replacements so that at all times the building structures and equipment shall be in good order, condition and repair. At the termination of the lease, Grant was obligated to return the premises to the taxpayer, together with the structures thereon. (R. 37a-38a.)

Upon the execution of the lease, Grant proceeded to erect a 35-story stone and steel office building with a five-story underground garage which has a composite depreciable life of fifty years from the date of its completion on August 31, 1929 (R. 38a).

Taxpayer paid an aggregate of $1,273,772.50 for the three parcels of land leased to Grant. This cost was later reduced to $1,142,772.50 because of a payment by the City of Pittsburgh to taxpayer pursuant to condemnation proceedings (R. 38a-

39a). Taxpayer furnished $1,026,227.50 toward the cost of the Grant Building which was expended solely in the construction of that building (R. 39a). The Tax Court held that taxpayer is entitled to a deduction for depreciation at the rate of two percent for each of the three taxable years upon its capital investment of $1,026,227.50 (R. 42a).

The Court of Appeals for the Third Circuit reversed the decision of the Tax Court, holding that the Tax Court's finding that taxpayer had an investment in the Grant Building consisting of the amount of its payment toward the cost of the building was without support in the record (R. 116).

ARGUMENT

The taxpayer in the present case and another corporation (Grant Building, Inc.) are rival claimants for depreciation on an amount of $1,026,227.50 which originated with taxpayer and was traced into the construction of a building erected by Grant Building, Inc. on land leased from the present taxpayer. Upon its books, this amount of $1,026,-227.50 was shown by taxpayer as "cost of land" and from the time of the completion of the building in 1929 until 1943, the taxpayer did not claim any allowance for depreciation. In 1943, the taxpayer filed claims for refund of income taxes paid with respect to the years 1939, 1940 and 1941, on the ground that it was entitled to depreciation on the $1,026,227.50. Grant, on the other hand, from the time of the completion of the building, and until the

filing of the present taxpayer's claims for refund, claimed and was allowed depreciation on this amount. After the present taxpayer filed its petition with the Tax Court in the present case, the Commissioner disallowed deductions claimed by Grant for the years 1943 and 1944, whereupon Grant petitioned the Tax Court for a review of the resulting deficiency. The Tax Court held in the present case that Revere was entitled to the deduction and in Grant's case held that Grant was not entitled to the deduction. In the Third Circuit the Commissioner's appeal in the present case and Grant's appeal in its case were argued successively on the same day, and were disposed of by the Court of Appeals in one opinion, which, however, treats the two cases separately. That court, reversing both decisions of the Tax Court, held that Grant and not Revere was entitled to the claimed deduction.[2]

It is believed that this case presents no novel or important unsettled principle of general application; that the case turns upon its own peculiar facts; and that the result reached by the Court of Appeals upon these facts is not only consistent with the manner in which the parties themselves had treated the matter for some thirteen years, but is correct.

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[2] The Government, in order to protect its interests, has secured an extension of time within which to file a petition for certiorari in the *Grant* case, but does not propose to file a petition if this Court does not grant certiorari in the present case.

1. The Court of Appeals correctly stated (R. 108) that a prerequisite for a depreciation deduction from taxable net income under Section 23(l) of the Internal Revenue Code, is an investment in the property sought to be depreciated. *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98; *Helvering* v. *F & R. Lazarus & Co.,* 308 U. S. 252; *Weiss* v. *Weiner,* 279 U. S. 333.[3] The court likewise correctly stated (R. 109, 116) that its function was to ascertain whether the record discloses a "substantial basis" for the Tax Court's finding. *Dobson* v. *Commissioner,* 320 U. S. 489; *Commissioner* v. *Scottish American Co.,* 323 U. S. 119, 124. The court thereupon entered upon an unusually exhaustive and detailed discussion (R. 111-116) of the evidence in the record in the present case. It concluded (R. 112, 113) that there was completely absent in the record any evidence of any agreement between the parties sustaining the Tax Court's

[3] The taxpayer suggests (Pet. 25) that the Court of Appeals "seemed to believe" that the lessor could not have a depreciable investment in the building, unless it was in the position of a joint adventurer, with some control over the operation of the building or the profits resulting from such operation. We do not so read the opinion below. The discussion in the court's opinion to which the taxpayer adverts (R. 109-110) is, we believe, to the effect that there is no evidence in the record to indicate that the taxpayer, by virtue of its "contribution" was to share in the profits or losses of the Grant building; that taxpayer was not given any right, title, interest or control in or over the building by virtue of its contribution; and that the record is devoid of any evidence demonstrating that taxpayer considered itself as embarking upon a joint venture with Grant. The court was merely pointing out that taxpayer was not entitled to depreciation on any of these grounds but was not holding that these were the only grounds upon which depreciation could be predicated.

finding that taxpayer had made a "capital investment" in Grant, and that, on the other hand, the record overwhelmingly demonstrates that the disbursements by taxpayer were not intended to be a "capital investment" in the building and were, in fact, never asserted to be such until more than thirteen years later.

The opinion discloses, we believe, a proper understanding of the governing rules of law and an unusually thorough study of the record. In addition, the Court afforded the taxpayer the unusual opportunity to have any error in the opinion or judgment corrected by setting its petition for rehearing for unlimited oral argument before the court sitting *en banc*.[4]

2. The taxpayer asserts (Pet. 26-29) a conflict between the decision below and *Gauley Mt. Coal Co.* v. *Commissioner*, 23 F. 2d 574 (C.C.A. 4th); *Colony Coal & Coke Corp.* v. *Commissioner*, 52 F. 2d 923 (C.C.A. 4th); and *Cripple Creek Coal Co.* v. *Commissioner*, 63 F. 2d 829 (C.C.A. 7th). In those cases, the taxpayer coal companies were held to have capital investments in railroad lines built to their properties to the extent that they paid the cost of such lines even though they acquired no ownership of the lines. Those cases did not hold, however, that the mere tracing of a taxpayer's money into a building or other property alone

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[4] The reporter's transcript of this oral argument is on file in the office of the Clerk of this Court.

gives the taxpayer a capital investment of the character subject to a depreciation allowance. In the present case, the record required the conclusion that notwithstanding taxpayer's money can be traced into the construction of a part of the Grant Building, the money was in fact not an investment in the building in the coal cases sense of that term, but additional cost of land. The inapplicability of the coal cases here is demonstrated by taxpayer's principal error and that of the Tax Court in assuming that the expenditure by taxpayer of money which ultimately was used as part of the Grant Building construction funds was *per se* an investment in the building. Thus, taxpayer asserts (Pet. 17) that "It was stipulated as a fact (App. 6A) that the petitioner invested the sum of $1,026,227.50 in" the Grant Building. Yet the stipulation merely states (R. 6A) "That the payment of $1,002,500, made by petitioner * * * and the payment of $23,727.50 * * * were both used, employed and applied exclusively and solely towards or on account of the cost of the construction and completion of the office and garage building known as the Grant Building." The Court of Appeals noted that the Tax Court proceeded under the same misapprehension stating (R. 109) "The Tax Court seems to have adopted the simple premise that since Revere's money had been used in the construction of the Grant Building * * * the transaction can consequently be regarded only as a 'capital investment.' "

There is no conflict with the doctrine of *Dobson* v. *Commissioner*, 320 U. S. 489. Here, the Court's rejection of the Tax Court's investment finding was on the ground that the finding was "without substantial basis." See *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 124. In any event the amendment to Section 1141(a) of the Internal Revenue Code, effective September 1, 1948, made by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Section 36, has enlarged the scope of review by Courts of Appeals of Tax Court decisions to that obtaining in the review of district courts in civil actions tried without a jury. Accordingly, the applicability of the *Dobson* scope of review to this case presents no important question.

3. The taxpayer's charge that the Court of Appeals took judicial notice of the contents of the record in the companion case, *Grant* v. *Commissioner*, decided June 18, 1948 (R. 97), in a manner in conflict with various decisions of other Courts of Appeals[5] (Pet. 14, 36-41) is without foundation. The court did not refer to "judicial notice" except in stating the Commissioner's alternative contention[6] (R. 99); moreover, its views,

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[5] *A. G. Reeves Steel Const. Co.* v. *Weiss*, 119 F. 2d 472, 474 (C.C.A. 6th), certiorari denied, 314 U. S. 677; *Morse* v. *Lewis*, 54 F. 2d 1027, 1029 (C.C.A. 4th), certiorari denied, 286 U. S. 557; *Paridy* v. *Caterpillar Tractor Co.*, 48 F. 2d 166 (C.C.A. 7th); and *National Surety Co.* v. *United States*, 29 F. 2d 92 (C.C.A. 9th).

[6] The Commissioner's position below, somewhat contrary to taxpayer's assertion (Pet. 37), was that the record required reversal of the Tax Court. Alternatively, it was argued that

in accordance with those expressed in the cases upon which taxpayer relies, have been vigorously stated in a recent opinion, *Funk* v. *Commissioner*, 163 F. 2d 796 (C.C.A. 3d). While it is true that in form the court wrote a single opinion (Pet. 37)[7] in substance there were two. A two-page introduction showing the relationship of the cases to each other and the contentions of the parties (R. 97-99) concluded with the statement that (R. 99) "Since the Grant record contains evidence absent in the Revere case, the cases will be treated separately." There then followed two separate opinions appropriately labelled and a concluding paragraph reversing both Tax Court decisions. The structure of the opinion, the court's express disavowal in the opinion of the intermingling of the two records[8] and its detailed discussion in connection with each case, devoted solely to the evidence in the respective records, demonstrate the lack of foundation in these charges.

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the court could judicially notice the companion *Grant* record for the sole purpose of satisfying itself that a miscarriage of justice would result if the case were not remanded so that the additional evidence in the *Grant* record could be offered in this case.

[7] The statement (Pet. 37) that the cases were heard together is inaccurate; they were heard consecutively under court oral admonition to confine the argument in each case to its own record.

[8] See in this connection the transcript of the argument on the question of rehearing where the charge was rebutted by the court. Pp. 9, 51, 52.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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